

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

BRINKER INTERNATIONAL PAYROLL
COMPANY LP, a limited partnership

and

Case No. 27-CA-110765

THE SAWAYA & MILLER LAW FIRM

Renee C. Barker, Esq., for the General Counsel
Kevin C. Berens, Esq. and *Ross M. Gardner, Esq.*,
Jackson Lewis, PC, Omaha, Nebraska, for the
Respondent
David H. Miller, Esq. and *Leslie Krueger-Pagett, Esq.*,
The Sawaya & Miller Law Firm, for the Charging Party

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case No. 27-CA-110765, filed on August 7, 2013, by The Sawaya & Miller Law Firm (“Charging Party”), a Complaint and Notice of Hearing (the “Complaint”) issued on January 30, 2014. The Complaint alleges that Brinker International Payroll Company LP (“Brinker” or “Respondent”), violated Section 8(a)(1) of the Act by maintaining and requiring as a condition of employment that employees execute an Agreement to Arbitrate which interferes with, restrains, and coerces them in the exercise of their Section 7 rights. Respondent filed an Answer denying the Complaint’s material allegations. On March 31, 2014, the parties filed a Joint Motion to Waive Hearing and Submit Case to the Administrative Law Judge and Joint Stipulation of Facts, pursuant to Section 102.35(a)(9) of the Board’s Rules and Regulations.

On the Joint Stipulation of Facts submitted by the parties, the parties’ Statements of Issues and Statements of Position, and their Briefs to the Administrative Law Judge, I make the following

Findings of Fact

I. Jurisdiction

At all times material to the complaint’s allegations, Respondent has been a Delaware limited partnership with BIPC Management LLC as its general partner and BIPC Investments LLC as its limited partner, and has been a wholly owned subsidiary of Brinker International, Inc., a Delaware corporation. At all material times, Respondent has been engaged in the business of employing the employees working in Maggiano’s Little Italy Restaurants (“Maggiano’s”) throughout the United States, including Maggiano’s Little Italy Restaurants located in the

Denver, Colorado area. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

5 II. Alleged Unfair Labor Practices

A. The Agreement to Arbitrate

10 Since at least January 7, 2013, Respondent has maintained an Agreement to Arbitrate, which all Maggiano's employees are required to execute as a condition of their employment. Respondent engages in the promulgation, dissemination, maintenance, modification, rescission and enforcement of the Agreement to Arbitrate. At all material times, the Agreement to Arbitrate has included the following language:

15 ...This agreement applies to all disputes involving legally protected rights (e.g. local, state and federal statutory, contractual or common law rights) regardless of whether the statute was enacted or the common law doctrine was recognized at the time this agreement was signed. This agreement does not limit an employee's ability to complete any external administrative remedy (such as with
20 the EEOC).

25 This Agreement to Arbitrate substitutes on legitimate dispute resolution form (arbitration) for another (litigation), thereby waiving the right of either party to have the dispute resolved in court. This substitution involves no surrender, by either party, of the substantive statutory or common law benefits, protection or defense for individual claims. You do waive the right to commence or be a party to any representative, collective or class action.

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35 The arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative, collective or class proceeding.

B. The Federal Class Action Litigation

40 Sarah Hickey, Amy Gulden, and Jay Ragsdale are former employees of Respondent, who were employed at Maggiano's restaurants in the Denver, Colorado area. Hickey, Gulden and Ragsdale all signed the Agreement to Arbitrate in June 2012.

45 On April 1, 2013, the Charging Party filed a class action complaint on behalf of Hickey, Gulden, and Ragsdale, as individual plaintiffs and on behalf of all others similarly situated, in the United States District Court for the District of Colorado. This complaint alleged that Respondent violated the Fair Labor Standards Act and the Colorado Wage Act, and contained allegations of tortious interference with contract, quantum meruit and unjust enrichment, and breach of contract. For purposes of clarity, this action, Civil Action No. 13-cv-00951-REB-BNB, will be referred to as the "FLSA action" or the "FLSA litigation."

50 On August 12, 2013, Respondent filed a Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims, Collective Action Claims, and Other Proceedings in the FLSA action. Respondent argued that the plaintiffs' claims were subject to the provisions of

the Arbitration Agreement, which prohibits class or collective claims and requires that employment-related disputes be individually arbitrated. Respondent contended that the complaint should therefore be dismissed pursuant to the Federal Arbitration Act. On February 18, 2014, the District Court issued an Order granting Respondent's Motion to Compel, dismissing plaintiffs' class and collective action claims with prejudice, and ordering the parties to arbitrate plaintiffs' individual claims. On February 20, 2014, the District Court issued a Final Judgment to that effect.

On March 20, 2014, the Charging Party filed a Notice of Appeal with the United States District Court for the District of Colorado, appealing the District Court's order granting Respondent's Motion to Compel to the United States Court of Appeals for the Tenth Circuit.

III. Analysis and Conclusion

A. The Positions of the Parties

General Counsel contends that Respondent's maintenance of the Agreement to Arbitrate violates Section 8(a)(1) of the Act, pursuant to *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), in that it prohibits employees from initiating or pursuing class or collective actions in any forum. General Counsel further asserts that the Agreement to Arbitrate may be reasonably interpreted by employees as precluding their right to file unfair labor practice charges with the National Labor Relations Board, and thus tends to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.*, 203 F.3d 52 (D.C. Cir. 1999). Finally, General Counsel argues that by filing the Motion to Compel in the FLSA action, seeking to enforce the unlawful Agreement to Arbitrate, Respondent further violated Section 8(a)(1) of the Act.

Respondent contends that the Agreement to Arbitrate does not violate Section 8(a)(1). Respondent argues that a finding that the Agreement to Arbitrate violates Section 8(a)(1) is precluded by the Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, --- U.S. ---, 131 S.Ct. 1740 (2011), holding that the Federal Arbitration Act requires that arbitration agreements including class action waivers should be enforced pursuant to their terms. Respondent asserts that in subsequent cases, the Supreme Court has stated that without a specific "Congressional command" in a federal statute's text, the statute will not be interpreted to override the Federal Arbitration Act in this respect. *Compucredit Corp. v. Greenwood*, --- U.S. ---, 132 S.Ct. 665 (2012); *American Express Co. v. Italian Colors Restaurant*, --- U.S. ---, 133 S.Ct. 2304 (2013). Respondent notes that all federal Courts of Appeal facing the issue have rejected the Board's holding in *D.R. Horton*, including the Fifth Circuit when deciding the Petition for Review of the Board's Decision and Order. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). As a result, Respondent argues that *D.R. Horton* should not be applied in this case, and that the Agreement to Arbitrate was lawful.

Respondent advances additional arguments in support of its contention that the Agreement to Arbitrate does not violate the Act. Respondent contends that at the time the *D.R. Horton* Decision was issued by the Board, the Board did not have a valid quorum, and the Board's Decision is therefore inoperative. Respondent further argues that the Agreement to Arbitrate, unlike the arbitration agreement at issue in *D.R. Horton*, explicitly excludes claims filed with federal administrative agencies, and therefore does not affect employees' exercise of their Section 7 rights. Respondent also asserts that the Complaint is time-barred pursuant to Section 10(b) of the Act.

B. The Agreement to Arbitrate

The evidence establishes that the Agreement to Arbitrate requires Respondent's employees to waive any right to pursue class or collective claims pertinent to their employment, in any forum. After limiting the forum for resolution of disputes between the employee and Respondent to arbitration, the Agreement to Arbitrate provides that employees "waive the right to commence or be a party to any representative, collective or class action." The Agreement to Arbitrate further states that "The arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative, collective or class proceeding."

By requiring that employees waive their right to pursue claims collectively in any forum, the Agreement to Arbitrate violates Section 8(a)(1) of the Act, pursuant to *D.R. Horton*. 357 NLRB No. 184 at 12-13. In *D.R. Horton*, the Board held that class or collective legal action on the part of employees, regardless of the particular forum involved, is a form of activity "at the core of what Congress intended to protect by adopting the broad language of Section 7," and is therefore "central to the Act's purposes." *D.R. Horton*, 357 NLRB No. 184 at 3. As a result, the Board held that "employers may not compel employees to waive their NLRA right to collectively pursue litigation and employment claims in *all* forums, arbitral and judicial." *D.R. Horton*, 357 NLRB No. 184, at 12 (emphasis in original). Because the Agreement to Arbitrate precludes Respondent's employees from initiating or pursuing any class or collective claim in any forum, Respondent's maintenance and enforcement of the Agreement to Arbitrate violates Section 8(a)(1), as alleged in the Complaint.

Respondent's arguments regarding the legal infirmity of the Board's *D.R. Horton* decision must be addressed to the Board itself, and not to an Administrative Law Judge. It is well-settled that the Board generally applies a "non-acquiescence policy" with respect to contrary views of the federal Courts of Appeal. See *D.L. Baker, Inc.*, 351 NLRB 515, 529, fn. 42 (2007); *Pathmark Stores, Inc.*, 342 NLRB 378, n. 1 (2004). Thus, the Administrative Law Judge is required to "apply established Board precedent which the Supreme Court has not reversed." *Pathmark Stores, Inc.*, 342 NLRB at 378, n. 1; see also *Gas Spring Co.*, 296 NLRB 84, 97-98 (1989), enf'd. 908 F.2d 966 (4th Cir. 1990). Although Respondent contends that the Supreme Court's decision in *ATT Mobility v. Concepcion* obviates the legal viability of *D.R. Horton*, the Board in *D.R. Horton* considered and distinguished that opinion given the number and scope of the contracts involved, and the conflict between the Federal Arbitration Act and state law at issue in the Supreme Court case. *D.R. Horton*, 357 NLRB No. 184, at p. 11-12, discussing *AT&T Mobility v. Concepcion*, 130 S.Ct. at 1748, 1750-1752. The subsequent Supreme Court decisions cited by Respondent as requiring a "contrary Congressional command" in order to forego enforcement of an otherwise valid arbitration agreement do not explicitly overrule the Board's *D.R. Horton* decision. *Compucredit Corp. v. Greenwood*, --- U.S. ---, 132 S.Ct. 665, 668-669 (2012); *American Express Co. v. Italian Colors Restaurant*, --- U.S. ---, 133 S.Ct. 2304, 2309 (2013). As a result, Respondent's argument that the Agreement to Arbitrate lawfully precludes class or collective legal actions because no "contrary Congressional command" requires that a waiver be rejected is also appropriately addressed solely to the Board itself.¹

¹ Respondent cites the Decision and Recommended Order of Administrative Law Judge Bruce D. Rosenstein in *Chesapeake Energy Corp.*, JD-78-13 (November 8, 2013), in further support of its argument that the Board's holding in *D.R. Horton, Inc.* is no longer tenable in light of the Supreme Court's opinion in *American Express Co.* Judge Rosenstein's Decision, which is now before the Board on Exceptions and Cross-Exceptions, is not precedential, and therefore I decline to find, as suggested by

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Respondent also points out that the Fifth Circuit when deciding the Petition for Review of *D.R. Horton* refused to enforce the portion of the Board's decision and order finding that an arbitration agreement which eliminated the right to initiate and pursue class or collective claims violated Section 8(a)(1). *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 362. Respondent notes that other Circuits addressing the issue have held that arbitration agreements requiring the waiver of class or collection actions do not violate Section 8(a)(1). *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bistol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). Regardless of this case law, as discussed above an Administrative Law Judge is bound by the decisions of the Board, including *D.R. Horton*, until overturned by the Board or the Supreme Court. See *Pathmark Stores, Inc.*, 342 NLRB at 378, n. 1; *Waco, Inc.*, 273 NLRB 746, 749, n. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enf. granted in part, 331 F.2d 176 (8th Cir. 1964). Therefore, Respondent's contentions based upon the decisions of the federal Courts of Appeal must also be directed to the Board

Respondent further contends that the Board's decision in *D.R. Horton* is invalid, because the Board lacked a valid quorum at the time the decision issued. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 81 U.S.L.W. 3629 (June 24, 2013). The Board has repeatedly held that because this issue has not been definitively resolved given the conflicting opinions of at least three other Circuits, the Board "is charged to fulfill its responsibilities under the Act." See, e.g., *Universal Lubricants, LLC*, 359 NLRB No. 157 at n. 1 (2013); *Belgrove Post Acute Care Center*, 369 NLRB No. 77, at p. 1 (2013). As a result, Respondent's argument regarding the lack of a valid Board quorum must be rejected.

Respondent's argument that the Complaint in this matter is time-barred pursuant to Section 10(b) of the Act is also unpersuasive. It is well-settled that where, as here, a rule violating Section 8(a)(1) is maintained during the 10(b) period, a violation is established even if the rule was promulgated prior to that time. See, e.g., *Register Guard*, 351 NLRB 1110, fn. 2 (2007), enf. granted and denied in part, 571 F.3d 53 (D.C.Cir. 2009). Although Respondent contends that the instant case involves not rules but agreements, which were executed in 2009, the Board has repeatedly treated mandatory arbitration policies, whether specifically executed by employees or not, as work rules subject to this particular Section 10(b) analysis. See *Supply Technologies, LLC*, 359 NLRB No. 38 at p. 1-4 (2012); *2 Sisters Food Group*, 357 NLRB No. 168 at p. 1-2 (2011); *U-Haul Co. of California*, 347 NLRB 375, 377-378 (2006), enf'd. 255 Fed.Appx. 527 (D.C.Cir. 2007). As a result, I find that the allegation that the Agreement to Arbitrate violates Section 8(a)(1) is not barred by Section 10(b) of the Act.

For all of the foregoing reasons, I find that the Agreement to Arbitrate, by prohibiting Respondent's employees from initiating or pursuing any class or collective claim in any forum, violates Section 8(a)(1) of the Act pursuant to the Board's decision in *D.R. Horton*.

General Counsel further contends that the Agreement to Arbitrate violates Section 8(a)(1) in that it may reasonably be interpreted to preclude the filing of unfair labor practice charges, and would therefore tend to chill the employees' exercise of their rights under Section 7. It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette*

Respondent, that *D.R. Horton* is no longer effective, given the well-settled case law regarding an Administrative Law Judge's duty to apply established and un-reversed precedent discussed herein.

Park Hotel, 326 NLRB at 825. A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following: (i) employees would “reasonably construe the rule’s language” to prohibit Section 7 activity; (ii) the rule was “promulgated in response” to union or protected concerted activity; or (iii) “the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that rules must be afforded a “reasonable” interpretation, without “reading particular phrases in isolation” or assuming “improper interference with employee rights.” *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. Ambiguities in work rules are construed against the party which promulgated them. See *Supply Technologies, LLC*, 359 NLRB No. 38 at p. 3; *Lafayette Park Hotel*, 326 NLRB at 828.

I find that employees would reasonably interpret Respondent’s Agreement to Arbitrate as prohibiting them from filing unfair labor practice charges, and that Respondent’s maintenance of the Agreement as a condition of employment therefore violates Section 8(a)(1) on this basis as well. The Agreement to Arbitrate contains broad language regarding the scope of its applicability. It begins by stating that Respondent “has provided for the resolution of *all disputes that arise between you and Brinker* through formal, mandatory arbitration before a neutral arbitrator” if those disputes cannot be resolved through Respondent’s internal procedures (emphasis added). As set forth above, the Agreement to Arbitrate provides that it

...applies to *all disputes involving legally protected rights (e.g. local, state and federal statutory, contractual or common law rights)* regardless of whether the statute was enacted or the common law doctrine was recognized at the time this agreement was signed

(emphasis added). The Agreement to Arbitrate also states that it “substitutes one legitimate dispute resolution forum (arbitration) for another (litigation), thereby waiving any right of either party to have the dispute resolved in court.” The Board has repeatedly held that sweeping language in defining the issues subject to solely arbitral resolution is reasonably interpreted by employees to encompass and prohibit the filing of unfair labor practice charges. See *Supply Technologies, LLC*, 359 NLRB No. 28 at p. 1-4 (agreement requiring that employees “bring any claim of any kind,” including “claims relating to my application for employment, my employment, or the termination of my employment” solely to employer’s alternative dispute resolution program reasonably interpreted as prohibiting the filing of unfair labor practice charges); *2 Sisters Food Group*, 357 NLRB No. 168 at p. 1-2, 22 (policy requiring that employees submit “all [employment] disputes and claims” to arbitration could be reasonably interpreted to preclude the filing of charges with the Board); *U-Haul Co. of California*, 347 NLRB at 377-378 (agreement requiring arbitration of “all disputes relating to or arising out of an employee’s employment...or the termination of that employment,” including “any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations” violated Section 8(a)(1)).

I further find that the Agreement’s language providing that it “does not limit an employee’s ability to complete any external administrative remedy (such as with the EEOC)” is insufficient to indicate to a reasonable employee that the Agreement does not prohibit the filing of unfair labor practice charges with the Board. This language does not explicitly exclude unfair labor practice charges filed with the National Labor Relations Board from the Agreement’s requirement that all employment-related claims be resolved in the context of arbitration. See *Supply Technologies, LLC*, 359 NLRB No. 38 at p. 2 (NLRB unfair labor practice charges not among enumerated exceptions to policy requiring arbitration of employment disputes); *2 Sisters*

Food Group, Inc., 357 NLRB No. 168 at p. 2 (same).² Furthermore, in the context of the reasonable interpretation analysis the Board has eschewed any assumption that employees have specialized legal knowledge or experience which they would bring to bear on an arbitration agreement's language. For example, in *2 Sisters Food Group, Inc.*, the Board found that language limiting the employer's policy to claims "that may be lawfully [] resolve[d] by arbitration" was not susceptible to the interpretation by "most nonlawyer employees," who would be unfamiliar with the Act's limitations on compulsory arbitration, that unfair labor practice charges were thereby excluded. 357 NLRB No. 168 at p. 2. Similarly, in *U-Haul Co. of California*, the Board concluded that employees without legal training could not be reasonably expected to understand that language limiting arbitration to disputes or claims "that a court of law would be authorized to entertain or would have jurisdiction over" consequently excluded unfair labor practice charges from the scope of the agreement. 347 NLRB at 377-378. Here, there is no basis to assume that a reasonable employee, unversed in labor and employment law, would understand the statement "This agreement does not limit an employee's ability to complete any external administrative remedy" to include filing an unfair labor practice charge with the Board, even if the agency were specifically mentioned. This is particularly the case in light of the Agreement's preceding language stating that "all disputes" arising between the employee and Respondent, and "all disputes involving legally protected rights" may only be resolved through arbitration.

For all of the foregoing reasons, I find that employees would reasonably interpret the Agreement to Arbitrate as prohibiting the filing of unfair labor practice charges, and that Respondent's maintenance of the Agreement to Arbitrate as a condition of employment violated Section 8(a)(1) as a result.

C. The Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims Filed by Respondent

I find, as General Counsel argues, that Respondent violated Section 8(a)(1) of the Act by enforcing the Agreement to Arbitrate when it filed the Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in the FLSA litigation. I find that Respondent's Motion to Compel had an illegal objective within the meaning of *Bill Johnson's Restaurants* and its progeny, in that it constituted both an attempt to enforce a policy which was in and of itself unlawful and an effort to directly proscribe employees' protected activity. As a result, Respondent violated Section 8(a)(1) by filing the Motion to Compel.

In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740-744, 748 (1983), the Supreme Court, formulating an accommodation between employee Section 7 rights and the First Amendment right of parties to petition the government for redress of grievances, held that only lawsuits motivated by a desire to retaliate against the exercise of Section 7 rights which lacked a reasonable basis in fact or law violated Section 8(a)(1) of the Act. However, the Supreme Court explicitly excluded from this analysis lawsuits filed with "an objective that is illegal under federal law." *Bill Johnson's Restaurants*, 461 U.S. at 737-738, fn. 5. In such cases, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite*

² I note that the Board has found that even language explicitly referring to an employee's responsibility to "timely file any charge with the NLRB" is insufficient to clarify a broad mandatory grievance and arbitration policy such that the policy would not be reasonably interpreted to prohibit the filing of unfair labor practice charges in violation of Section 8(a)(1). See *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007).

Aid), 305 NLRB 832, 834 (1991), enf'd. 973 F.2d 230 (3rd Cir. 1992). Subsequently, in *BE & K Construction Co. v. NLRB*, the Court invalidated the Board's rule that an unsuccessful lawsuit filed for retaliatory reasons violated the Act even if reasonably based. 536 U.S. 516, 529-530 (2002). On remand, the Board held that that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of the party's motive for bringing it, so that only lawsuits which are "both objectively and subjectively baseless" are unlawful. *BE & K Construction Co.*, 351 NLRB 451, 458 (2007). However, since *BE & K Construction Co.*, the Board has repeatedly held that the Supreme Court's opinion in that case "did not alter the Board's authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice." *Dilling Mechanical Contractors*, 357 NLRB No. 56, at p. 3 (2011); *Plasterers Local 200 (Standard Drywall)*, 357 NLRB No. 179, at p. 3, fn. 7 (2011), enf'd. 547 Fed.Appx. 812 (9th Cir. 2013), and 357 NLRB No. 160, p. 3 (2011), enf'd. 547 Fed.Appx. 809 (9th Cir. 2013); *Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 540, fn. 7 (2005); see also *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003). As a result, lawsuits motivated by an illegal objective remain exempt from the *Bill Johnson's* and *BE & K* analysis, and violate the Act.

In addition, the Board has held that specific actions taken by a party in the context of litigation may have an illegal objective, and therefore violate Section 8(a)(1), even if the underlying lawsuit itself does not. In particular, the Board has held that discovery requests which seek information regarding employees' participation in union activity have an illegal objective, and therefore violate Section 8(a)(1). See *Dilling Mechanical Contractors*, 357 NLRB No. 56, at p. 1, 3 ("discovery requests" seeking the names of employees who had joined the union had an illegal objective and therefore violated Section 8(a)(1)); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enf'd. 200 F.3d 1162 (8th Cir. 2000) (discovery request seeking the identities of employees who signed collective bargaining authorizations unlawful).

I find that Respondent's Motion to Compel in the instant case had an illegal objective in that it was an attempt to enforce the unlawful Agreement to Arbitrate. It is well-settled, as discussed in the Supreme Court's *Bill Johnson's* opinion, that lawsuits which attempt to enforce contract provisions and policies which violate the Act in and of themselves constitute independent statutory violations. *Bill Johnson's Restaurants*, 461 U.S. at 737-738, fn. 5, citing *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), enf. denied, 446 F.2d 369 (1st Cir. 1971), rev'd., 409 U.S. 213 (1972) and *Booster Lodge No. 405*, 185 NLRB 380, 385 (1970), enf'd., 459 F.2d 1143 (D.C. Cir. 1972), aff'd., 412 U.S. 84 (1973) (noting that the Court had "upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act"); see also *Regional Construction Corp.*, 333 NLRB 313, 319 (2001) (illegal objective extant in "cases where the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act"). In this case, Respondent's Motion to Compel constituted an effort to enforce the Agreement to Arbitrate which, for the reasons discussed above, violates Section 8(a)(1) of the Act in and of itself. The filing of the Motion to Compel consequently violated Section 8(a)(1) as well.

In addition, the Motion to Compel violated Section 8(a)(1) as an attempt to directly prevent employees from engaging in activity protected by Section 7. The Board has repeatedly found that lawsuits designed to prevent employees' Section 7 activity have an illegal objective, and therefore violate Section 8(a)(1). For example, in *Federal Security, Inc.*, the Board determined that a lawsuit alleging that employees engaged in abuse of process and malicious prosecution by filing an unfair labor practice charge and providing evidence to the Board had the illegal objective of seeking to punish and deter access to Board processes, activity protected by Section 7. 359 NLRB No. 1, at p. 13-14 (2012). See also *Manno Electric*, 321 NLRB 278, fn. 5,

295-298 (1996), enf'd. 127 F.3d 34 (5th Cir. 1997) (lawsuit alleging that employees' made "false" statements in "bad faith" to the Board had illegal objective and therefore violated Section 8(a)(1)); and see *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enf'd. 902 F.2d 1297 (8th Cir. 1990) (union grievance premised upon an interpretation of its collective bargaining agreement which would violate Section 8(e) of the Act had an illegal objective).

Here, the Motion to Compel, in that it sought dismissal of the employees' class or collective claims, attempted to directly interfere with employee' activity protected by Section 7. As the Board explained in *D.R. Horton*, collective efforts to address workplace grievances through arbitration and litigation constitute protected concerted activity, and thus "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." 357 NLRB No. 184, at p. 3. The Motion to Compel in the instant case, by urging the district court to dismiss the employees' class or collective claims, sought to directly prevent them from engaging in activity protected under Section 7. The Motion to Compel therefore had an illegal objective, and Respondent's filing of the Motion violated Section 8(a)(1) on this basis as well.³

For all of the foregoing reasons, I find that Respondent's Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in the FLSA litigation had an illegal objective, and therefore violated Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent, Brinker International Payroll Company, L.P., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By maintaining a mandatory arbitration policy which employees are required to sign as a condition of their employment, requiring that employees waive their right to pursue class or collective claims in any forum, Respondent has violated Section 8(a)(1) of the Act.

3. By maintaining a mandatory arbitration policy which employees are required to sign as a condition of their employment, which would be reasonably interpreted as prohibiting employees from filing unfair labor practice charges with the Board, Respondent has violated Section 8(a)(1) of the Act.

4. By filing a Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims, Collective Action Claims, and other Proceedings, on August 12, 2013 in the United States District Court for the District of Colorado in Civil Action No. 13-cv-00951-REB-BNB, in order to enforce its Agreement to Arbitrate, Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

³ Because I find that Respondent's Motion to Compel had an illegal objective, I do not find, as Respondent argues, that the instant case violates Respondent's First Amendment right to defend itself in the FLSA litigation, and should be stayed pending the outcome of the FLSA litigation as a result.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent maintained a mandatory arbitration policy, the Agreement to Arbitrate, which requires that employees waive their right to pursue class or collective action claims in any forum, and may be reasonably interpreted as prohibiting employees from filing unfair labor practice charges. I therefore recommend that Respondent be ordered to rescind the Agreement to Arbitrate, and to provide the employees with specific notification that the Agreement has been rescinded. I recommend that Respondent be ordered to alternatively revise the Agreement to Arbitrate to clarify that it does not constitute a waiver in all forums of the employees' right to maintain employment-related class or collective claims, and does not restrict employees' right to file unfair labor practice charges with the National Labor Relations Board, and to notify the employees of the revised agreement, including providing the employees with a copy of the revised agreement. Because Respondent required that its employees at all dine-in public Maggiano's Little Italy Restaurants throughout the nation execute the Agreement to Arbitrate as a condition of their employment, I will recommend that Respondent post a notice in all locations where the Agreement to Arbitrate was utilized. *D.R. Horton, Inc.*, 357 NLRB No. 184 at p. 13; *U-Haul Co. of California*, 347 NLRB at 375, fn. 2; see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enf'd. in relevant part, 475 F.3d 369 (D.C.Cir. 2007).

In addition, I recommend that Respondent be ordered to file, together with the Charging Party, a joint motion to vacate the District Court's February 18, 2014 Order granting Respondent's Motion to Compel, dismissing plaintiffs' class and collective action claims with prejudice, and ordering the parties to arbitrate plaintiffs' individual claims in Civil Action No. 13-cv-00951-REB-BNB. This action is necessary to fully remedy the violation, because the Motion to Compel had an illegal objective and was therefore unlawful from its inception, and should never have been filed or granted. *Manno Electric*, 321 NLRB at 297-298. The Board has in previous cases ordered respondents to take such specific actions to remedy the effects of having prosecuted lawsuits engendered by an illegal objective, or otherwise unlawful pursuant to *Bill Johnson's* and related cases. *Federal Security, Inc.*, 359 NLRB No. 1, at p. 13-14 (respondent ordered to withdraw or seek to dismiss lawsuit filed with an illegal objective, and have default orders vacated); *Federal Security, Inc.*, 336 NLRB 703, n. 3, 704 (2001); see also *Loehmann's Plaza*, 305 NLRB 663, 673 (1991) (ordering respondent to seek to have a permanent injunction against peaceful picketing and handbilling withdrawn); *Baptist Memorial Hospital*, 229 NLRB 45, 45-46 (1977), enf'd., 568 F.2d 1 (6th Cir. 1977) (ordering respondent to file a joint petition to expunge an arrest and conviction record created by police action initiated by respondent's unlawful conduct). The filing of such a joint motion shall be at the Charging Party's request and subject to the time limitations for doing so pursuant to the Federal Rules of Civil Procedure.

I further recommend that Respondent be ordered to reimburse Sarah Hickey, Amy Gulden, Jay Ragsdale, and any other affected employees for any litigation and related expenses incurred, to date and in the future, directly related to Respondent's Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado. See *Federal Security, Inc.*, 359 NLRB No. 1, at p. 14. The applicable rate of interest on the reimbursement will be determined pursuant to *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and interest on all amounts due to the employees shall be computed on a daily basis pursuant to *Kentucky*

River Medical Center, 356 NLRB 8 (2010), enf. denied on other grounds, 647 F.3d 1137 (D.C. Cir. 2011).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended⁴

ORDER

Respondent, Brinker International Payroll Company, L.P., a Delaware limited partnership, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy which requires that employees waive their right to pursue class or collective claims in any forum.

(b) Maintaining a mandatory arbitration policy which would be reasonably interpreted as prohibiting employees from filing unfair labor practice charges with the National Labor Relations Board

(c) Filing motions to enforce its Agreement to Arbitrate, to thereby compel individual arbitration and preclude employees from pursuing employment-related disputes with Respondent on a class or collective basis in any forum.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Agreement to Arbitrate to make clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, and does not restricted employees' right to file unfair labor practice charges with the National Labor Relations Board.

(b) Notify the employees of the rescission or the revised agreement, and provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 7 days after service by the Region, file, together with the Charging Party, a joint motion to vacate the District Court's February 18, 2014 Order granting Respondent's Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims, dismissing plaintiffs' class and collective action claims with prejudice, and ordering the parties to arbitrate plaintiffs' individual claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado. Such filing shall be at the Charging Party's request and subject to the time limitations for doing so pursuant to the Federal Rules of Civil Procedure.

⁴ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Reimburse Sarah Hickey, Amy Gulden, Jay Ragsdale, and any other affected employees for any litigation and related expenses incurred, to date and in the future, directly related to Respondent's Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado.

(e) Within 14 days after service by the Region, post at all dine-in Maggiano's Little Italy Restaurants where the Agreement to Arbitrate was utilized by Respondent copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC June 4, 2014

Lauren Esposito
Administrative Law Judge

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a mandatory arbitration policy which requires that employees waive their right to pursue class or collective claims in any forum.

WE WILL NOT maintain a mandatory arbitration policy which would be reasonably interpreted as prohibiting employees from filing unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT enforce or attempt to enforce a mandatory arbitration policy in order to compel individual arbitration and preclude employees from pursuing employment-related disputes with Respondent on a class or collective basis.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL rescind or revise our Agreement to Arbitrate to make clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, and does not restrict employees' rights to file unfair labor practice charges with the national Labor Relations Board.

WE WILL notify the employees of the rescinded or revised Agreement to Arbitrate, and provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

WE WILL within 7 days after service by the Region, file, at the Charging Party's request and together with the Charging Party, a joint motion to vacate the District Court's February 18, 2014 Order granting the Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado, to the extent that the motion may be filed under the rules which apply in the District Court.

WE WILL reimburse Sarah Hickey, Amy Gulden, Jay Ragsdale, and any other affected employees for any litigation and related expenses incurred plus interest, to date and in the future, directly related to the Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado.

BRINKER INTERNATIONAL PAYROLL
COMPANY LP, a limited partnership

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294
(303) 844-3551, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-110765 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND
MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS
CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-6647.